Jan 13 2000

(11)

No. 99-474

Supreme Court, U.S.
FILED
JAN 13 2000
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Amici will address the following question:

Whether the Massachusetts Burma Law violates the Foreign Commerce Clause.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that concern state and local governments, including issues of the allocation of state and federal powers that affect foreign relations and foreign commerce.[1] This case, involving a challenge to a Massachusetts law entitled "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)," ch. 130, 1996 Mass. Acts 239 (codified at Mass. Gen. Laws ch. 7, §§ 22G-22M) (the "Massachusetts Burma Law," presents three related issues in that area: whether federal law preempts the Massachusetts law; whether the law violates the Foreign Commerce Clause, U.S. Const. art. I, § 8, cl. 3; and whether the law runs afoul of the federal foreign affairs power. *See Zschernig v. Miller*, 389 U.S. 429 (1968) (recognizing such a power). For reasons stated at the beginning of the Argument section below, this brief will address only the Foreign Commerce Clause issue.

The question whether the Massachusetts Burma Law is unconstitutional is of fundamental importance to *amici*. *See* Pet. App. 10a (noting that municipal governments have enacted similar purchasing laws). The public procurement activities governed by the Burma Law are traditional exercises of the power of state and local governments to spend their lawfully gathered resources in accordance with the wishes of their citizens. *Amici* respectfully submit that the Constitution permits States and munici-

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

palities to refrain from using public funds in ways that they believe support persistent, egregious, and well-documented human rights violations by foreign governments.

Because of the importance of the issues presented to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

The Massachusetts Burma Law does not run afoul of this Court's dormant Foreign Commerce Clause doctrine. It does not offend either of the policies that are common to this Court's analysis under the Domestic and Foreign Commerce Clauses: it is neither in purpose nor effect economically protectionist, and it is not an attempt to regulate extraterritorial conduct. Neither does it conflict with the policy particular to the dormant Foreign Commerce Clause, the preservation of the federal government's ability to "speak with one voice" on foreign commercial relations.

Central to the constitutionality of the Massachusetts Burma Law is the fact that it concerns an exercise of the proprietary, noncoercive power to determine the disposition of public funds rather than an exercise of the States' coercive governmental powers of regulation or taxation. This feature of the Burma Law renders it constitutional under two independent components of dormant Commerce Clause analysis.

1. As an exercise of the power to direct the uses of the public fisc without an economically protectionist motive or effect, the Burma Law fits within the Court's "market participant" doctrine. Because the Burma Law neither links an exercise of the spending power to a targeted tax in a manner likely to endanger Commerce Clause values, nor leverages the State's spending power in the service of

economic protectionism, it does not fall into either of the exceptions to the market participant doctrine recognized by this Court. Contrary to the reasoning of the court of appeals, the protection of the market participant doctrine cannot be limited to proprietary actions motivated by economic self-interest, but rather must extend to actions based on ethical concerns. The rationales underlying the market participant doctrine—the self-limiting character of state proprietary actions, their importance to state sovereignty, and their lack of interference with federal regulation of private interstate and foreign commerce, which constitutes the great bulk of that commerce—make it fully applicable to Foreign Commerce Clause analysis.

2. Although the Massachusetts Burma Law facially discriminates against foreign commerce, its discrimination "is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. v. Limbach*, 486 U.S. 269, 274 (1988). The law therefore does not violate the Commerce Clause regardless of its qualification under the market participant doctrine. The clearest "valid factor" or "legitimate local purpose," *New Energy Co.*, 486 U.S. at 278, is the State's interest in ensuring that public funds are not used to support morally offensive practices of the Burmese government, whether or not withholding those funds leads to reform or communicates disapproval to the relevant Burmese officials. That legitimate interest in the use of state funds is not related to economic protectionism, and "cannot be adequately served by reasonable nondiscriminatory alternatives," *id.*, because any attempt to avoid supporting morally offensive practices perpetrated by a foreign regime must identify that regime.

ARGUMENT

I. THE MASSACHUSETTS BURMA LAW DOES NOT VIOLATE THE FOREIGN COMMERCE CLAUSE BECAUSE IT ADDRESSES THE COMMONWEALTH'S ACTIVITIES AS A MARKET PARTICIPANT

Amici agree with petitioners that federal law clearly does not preempt the Massachusetts Burma Law, so that the Court will have to address the constitutional issues presented in this case. *Amici* also believe that this Court's analysis of state law that affects foreign commercial relations should and will be conducted under the Commerce Clause, which explicitly grants Congress the power "[t]o regulate Commerce with foreign Nations." U.S. Const. art. I, § 8, cl. 3. Whatever may be the scope of the nontextual "foreign affairs power" in areas of foreign relations outside of the commercial realm, *see Zschernig v. Miller*, 389 U.S. 429 (1968), there is no reason to give it any scope at all when addressing foreign commercial relations, because the powers of federal and state governments in that area are governed by an express constitutional provision. *Cf. Graham v. Connor*, 490 U.S. 386, 395 (1989). Since the Massachusetts Burma Law is concerned exclusively with Massachusetts' commercial relations with companies doing business with or in Burma, it falls within that category of state law subject to analysis under the Commerce Clause. This brief will therefore address only the question whether the Massachusetts Burma Law is invalid under this Court's dormant Foreign Commerce Clause doctrine.

The Massachusetts Burma Law does not violate the Foreign Commerce Clause because it addresses a proprietary activity—the State's determination of how it will spend its own lawfully collected funds. As this Court has articulated in its "market participant" doctrine, such activ-

ity is generally not subject to dormant Commerce Clause scrutiny, and the Burma Law does not fall within either of the two exceptions to that rule. The rationales underlying the market participant doctrine make the doctrine fully applicable in the Foreign Commerce Clause context.

A. The Market Participant Doctrine Applies To The Massachusetts Burma Law's Conditions On Public Procurement

The Massachusetts Burma Law sets guidelines for the Commonwealth and its agencies to follow while they are exercising their noncoercive spending power. The guidelines do not create any identified risk of protectionism. Together, those features qualify the Burma Law for protection under this Court's market participant doctrine. That doctrine recognizes that Congress's Commerce Clause power does not need prophylactic protection from a State's choices about how to exercise its noncoercive power to distribute its lawfully gathered resources, as long as those choices do not present a particular, identified risk of protectionism.

1. At the core of the powers granted Congress by the Commerce Clause is the power to invalidate or negate state laws that, in Congress's judgment, unduly hinder interstate or foreign commerce. This is the original meaning of the "negative" Commerce Clause. *See, e.g.*, 3 M. Farrand, *Records of the Federal Convention of 1787*, 478 (1911) (Letter of James Madison) (the Commerce Clause "was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the Federal Government"). Over the past one-and-a-half centuries, this Court has developed its own prophylactic "negative" or "dormant" Commerce Clause doctrine, under which the Court itself invalidates some of the most serious

state-law challenges to the free market values that the Commerce Clause granted Congress the power to promote, while leaving Congress the power explicitly to sanction such laws. *See, e.g., Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945) (recognizing that, while the Commerce Clause limits state power even absent Congressional legislation, Congress has "undoubted" power to "permit the states to regulate the commerce in a manner which would otherwise not be permissible").

This Court has decided scores of dormant Commerce Clause cases over the last 150 years. But until 1976 it was not asked to decide whether an exercise of a State's proprietary functions—its power to spend state funds or dispose of state property—ran afoul of dormant Commerce Clause doctrine, even though over that period States routinely discriminated against interstate and foreign commerce while spending and disposing of property in ways that would have violated core dormant Commerce Clause doctrine had that discrimination accompanied exercises of state powers to tax or regulate. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808 (1976); *id.* at 817 (Stevens, J., concurring) ("[T]here must have been countless situations during the past two centuries in which the several States have experimented with differing methods of encouraging local enterprise without providing like encouragement to out-of-state competitors."); *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n. 9 (1980) (citing numerous state court decisions from 1898 onwards holding that state proprietary functions were not subject to dormant Commerce Clause scrutiny).

The explanation for the tacit agreement that spending power exercises do not ordinarily raise dormant Commerce Clause concerns rests on the distinction between a State's coercive sovereign powers and its noncoercive proprietary powers, and on the full applicability of the dormant Commerce Clause to its coercive powers. When States decide how to spend state funds and dispose of state property, they are not exercising any distinctive sovereign powers, but rather are exercising the same property rights as they recognize in private individuals and businesses.[2] To be sure, States usually acquire property through the coercive sovereign power of taxation, which distinguishes them from private parties. That power of taxation, however, is fully subject to dormant Commerce Clause strictures. Thus, the funds over which a State has proprietary discretion have been gathered through taxes that do not discriminate against interstate or foreign commerce, and the bulk of those funds are ordinarily gathered from the same state residents who, through their legislators, decide how to use those funds.

Once it is determined that state funds have been gathered in an evenhanded manner falling largely on participants in the state political process, dormant Commerce Clause concerns have usually been satisfied. Absent special, limited circumstances, a State, " '[l]ike private individuals and businesses, . . . enjoys the unrestricted

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[2] This distinction was muddied by the 19th-century legal fiction, since discarded, that States "owned" all natural resources within their jurisdictions. *See Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979) (holding that state regulation of wild animals should be governed by ordinary Commerce Clause analysis, and overruling *Geer v. Connecticut*, 161 U.S. 519 (1896)). The Massachusetts Burma Law does not concern natural resources, however, but funds to which the State has title in the same way that a private Massachusetts resident would.

Of course, property rights are themselves enforced by coercive sovereign powers, but the powers of disposal granted proprietors under state property law normally include a realm of discretion that does not draw any distinction between domestic and foreign jurisdictions. Needless to say, state property law that discriminates without justification against interstate or foreign commerce is fully subject to invalidation under dormant Commerce Clause doctrine.

power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.'" *Reeves*, 447 U.S. at 439 n. 12 (1980) (quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940)) (emphasis deleted). The policy grounds underlying the recognition of this "unrestricted power" include both respect for the role of each State "'"as guardian and trustee of its people,"'" *Reeves*, 447 U.S. at 438 (quoting *Heim v. McCall*, 239 U.S. 175, 191 (1915) (quoting *Atkin v. Kansas*, 191 U.S. 207, 222-223 (1903))), and acknowledgment that spending power discrimination is self-limiting, because it relies on the legislature's ability and willingness to assess taxes on participants in the state political process. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994) (noting that evenhanded taxes are generally upheld in part because "'[t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse'") (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n. 17 (1981)); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 184 n. 2, 187 (1938).

Since 1976, this Court has articulated the longstanding tacit approval of discriminatory spending power exercises as the "market participant" doctrine. *See Hughes*, 426 U.S. at 810; *Reeves*, 447 U.S. at 436; *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 215 (1983). This doctrine covers a wide variety of exercises of the power to spend funds and dispose of property, including purchasing goods and services, *see White*, 460 U.S. at 205-06 (financing public construction projects on the condition that 50% of construction workers be city residents), selling state-owned property, *see Reeves*, 447 U.S. at 431-32 (preferring state residents in selling a limited supply of cement from a state-owned

plant), and subsidizing local businesses, *see Hughes*, 426 U.S. at 801 (providing "bounties" for the delivery of inoperable automobiles to scrap processors on easier terms to in-state than out-of-state processors).

The public procurement activities governed by the Massachusetts Burma Law fall squarely within the scope of the market participant doctrine. They are traditional exercises of a State's power to determine how to spend its lawfully gathered resources.

2. In the last fifteen years, this Court has also for the first time struck down spending power exercises on Commerce Clause grounds. It did so in two narrow circumstances in which those exercises presented an acute risk of undermining core Commerce Clause values because they were not self-limiting as spending power exercises usually are. The Massachusetts Burma Law does not create any such condition.

In *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), this Court held that a Massachusetts subsidy to Massachusetts dairy farmers violated dormant Commerce Clause doctrine because the subsidy was directly linked to and funded by a tax on all milk sold in Massachusetts. The Court noted that such a subsidy "funded out of general revenue ordinarily imposes no burden on interstate commerce." *Id.* at 199. The linkage of subsidy and targeted tax, however, insulated the tax from the normal political processes that would keep it in check, and thus created a concentrated threat to Commerce Clause values: "when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy." *Id.* at 200.

Second, in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), the Court held that a sale of state-owned timber conditioned on the purchaser processing the timber before shipping it out of the State violated the Commerce Clause because the State was using its power to dispose of public property to favor intrastate commerce in a manner that risked circumventing the self-limiting quality of that power. The *South-Central Timber* plurality concluded that Alaska was attempting to leverage its ownership of timber by "govern-[ing] the private, separate economic relationships of its trading partners," *id.* at 99 (plurality opinion), in order to encourage " 'business operations to be performed in the home State that [might] more efficiently be performed elsewhere.' " *Id.* at 100 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970)).

This was, the plurality reasoned, a type of burden on commerce that the Court has " 'declared to be virtually *per se* illegal.' " *Id.* (quoting *Pike*, 397 U.S. at 145). The Court had previously questioned a similar leveraging technique in dictum in *White* when it noted that the residency requirement in that case "does not represent the sort of 'attempt to force virtually all businesses that benefit in some way from the economic ripple effect' of the city's decision to enter into contracts for construction projects 'to bias their employment practices in favor of the [city's] residents.' " *White*, 460 U.S. at 211 (quoting *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978)). Here, the presumed vice of Alaska's law was that through leveraging it created a protectionist effect greater than a simple subsidy would, and thus did not limit the quantum of economic favoritism to that for which local taxpayers were willing to pay.[3]

[3] *Amici* do not necessarily agree that the law in *South-Central Timber* actually had such a disproportionate effect, or that *South-Central Timber* was correctly decided, but assume that it was correctly decided for purposes of this argument.

The Massachusetts Burma Law does not present either of these two kinds of threats. The Burma Law obviously does not create a tax/subsidy linkage of the type the Court struck down in *West Lynn Creamery*.

The court of appeals' heavy reliance on the *South-Central Timber* plurality and the dictum in *White*, *see* Pet. App. 43a-45a, is also misplaced. Not only does the Burma Law not produce leveraged economic favoritism of the type the Court disapproved of in *South-Central Timber*, it does not produce *any* economic favoritism at all. There is no identifiable group of Massachusetts political participants that is economically benefited by the Massachusetts Burma Law. If Massachusetts rejects a low bid from a company with Burmese connections due to Burma Law procurement restrictions, Massachusetts taxpayers suffer because they must pay more for the goods or services at issue; Massachusetts beneficiaries of public projects suffer because the projects are more likely to be eliminated or scaled down due to higher costs; and Massachusetts businesses suffer because they, like out-of-state businesses, must choose between doing business with Burma and doing business with the Commonwealth of Massachusetts.[4] In other words, as developed more fully

[4] There are apparently more foreign companies than United States companies on Massachusetts's "restricted purchase list" of all firms engaged in business with Burma. *See* Pet. App. 10a (at the time respondent filed its complaint, forty-four of 346 companies on the restricted purchase list were United States companies). This fact, however, does not demonstrate that Massachusetts businesses are favored by the Burma Law. Many of the foreign companies engaged in business with Burma undoubtedly have operations limited to southeast Asia or other parts of the world outside the United States and have never desired to engage in business with the Commonwealth of Massachusetts; to *amici*'s knowledge, there is no evidence in the record concerning the num-

below, the Massachusetts Burma Law is simply not an economically protectionist law, which cleanly distinguishes it from the law struck down in *South-Central Timber*.

The unduly formalistic language in the *South-Central Timber* plurality opinion that influences some of the court of appeals' reasoning about the "regulatory" character of the Massachusetts Burma Law, *see* Pet. App. 43a-44a, is, if read literally, simply mistaken. In one passage, the *South-Central Timber* plurality seems to suggest that, while Alaska acted as a proprietor exercising its non-coercive power to dispose of its property as long as it imposed only contractual conditions relating directly to the transaction in which it was disposing of the property, it became a government exercising its distinctive coercive power of regulation the moment it imposed unrelated conditions on such a disposition. *See South-Central Timber*, 467 U.S. at 97-99 (plurality opinion) (distinguishing between Alaska's roles as "market regulator" and "market participant").

This makes no sense. A private owner disposing of property does not suddenly exercise sovereign powers when he imposes unrelated conditions on that disposition.[5]

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ber of foreign and domestic companies that have actually submitted or desired to submit bids on Massachusetts projects, either before or after the passage of the Burma Law. Of course, there has never been the slightest suggestion that the Massachussetts Burma Law was motivated in any part by a desire to favor Massachussetts companies.

[5] The *South-Central Timber* plurality cites as a major inspiration for its decision to invalidate economically protectionist leveraging the antitrust law limitation on vertical restraints. *See South-Central Timber*, 467 U.S. at 98 (plurality opinion); *see also White*, 460 U.S. at 219 n.4 (Blackmun, J., concurring in part and dissenting in part) (similarly referring to the antitrust vertical-restraint limitation). Antitrust law, however, does not limit vertical restraints because they are invalid attempts by private parties to

He is still acting as a proprietor, and so was the State of Alaska in *South-Central Timber* when it conditioned a sale of state-owned timber on in-state processing but did not attempt to force in-state processing of privately owned timber. The *South-Central Timber* plurality's use of the terms "market regulator" and "market participant" only make sense as shorthand for types of proprietary actions that do and do not create a special danger to Commerce Clause values. Because the Massachusetts Burma Law creates no special danger to those values, there is no reason for this Court to invalidate it as "market regulation."

Finally, the court of appeals erred on two levels when it reasoned that Massachusetts's refusal to do business with companies involved in Burma could not be classified as market participation because "ordinary" private market participants would not so act. The court stated:

> Even if certain companies ceased purchasing goods from companies that maintain investments in Burma, such a fact would not be sufficient to lead us to consider the Massachusetts Burma Law to be market participation. The proper inquiry is whether Massachusetts is acting as an ordinary market participant would act, not whether any participant has acted in such a fashion.

Pet. App. 48a. Surely, however, the proper inquiry is whether a private market participant *could* act as Massachusetts has, not whether statistics would show that the average private market participant has or has not so acted. A freedom that is exercised infrequently may be nonetheless an important freedom, precisely because it

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exercise a coercive sovereign power of regulation; it limits vertical restraints because they endanger the values and policies underlying antitrust law. In the same way, the only intelligible ground of the ban on economically protectionist leveraging is the danger it poses to Commerce Clause values.

becomes crucial only in egregious cases that are themselves rare.

Moreover, it is simply incorrect to assert, as the court of appeals did, that the "ordinary market participant" rarely if ever breaks off ties with a company due to ethical objections to that company's dealings. For example, investors are quintessential ordinary market participants, yet in 1999 American investors had over $2.16 trillion in "socially responsible" investment funds that used some guideline other than raw profit to limit their investments in companies. *See* Social Investment Forum, 1999 Report on Socially Responsible Investing Trends in the United States (1999), http://www.socialinvest.org/areas/research/trends/1999-Trends.htm. That figure represents over one-eighth of the total $16.3 trillion in investment assets under management in the United States. *See id.* Thus, the court of appeals' assumption that sensible private market participants virtually never take ethical considerations into account is simply wrong, further undermining the notion that the market participant doctrine should protect actions motivated by pure greed but not actions stemming from moral concerns. The Massachusetts Burma Law falls squarely into the realm of spending power discretion recognized by this Court under the market participant doctrine, and should for that reason pass dormant Commerce Clause scrutiny.

B. The Rationales Underlying The Market Participant Doctrine Make It Fully Applicable To Foreign Commerce Clause Analysis

This Court has at times suggested that Foreign Commerce Clause scrutiny is more rigorous than Domestic Commerce Clause scrutiny. It has stated that it will consider an additional factor under the Foreign Commerce Clause, namely whether the law "prevents the Federal

Government from 'speaking with one voice when regulating commercial relations with foreign governments.' "[6] *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979) (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)); *see also South-Central Timber*, 467 U.S. at 100 (plurality opinion) (same). It has also stated that it will generally look more closely at state laws touching on foreign commerce. *See, e.g., id.* at 96 (plurality opinion). Citing these statements, the court of appeals expressed its skepticism "of whether the market participation exception applies at all . . . to the Foreign Commerce Clause." Pet. App. 48a.

The court of appeals' skepticism is unwarranted. The rationales underlying the market participant doctrine are equally applicable in domestic and foreign contexts, and the doctrine should be given full effect in Foreign Commerce Clause analysis. The "one voice" language used in *Japan Line* and *South-Central Timber* employs a striking metaphor, but applied as a test within dormant Foreign Commerce Clause analysis, it is misleading and largely unhelpful, because it ultimately rests on a categorical understanding of the dormant Commerce Clause that this Court long ago rejected.

Under one literal interpretation of the "one voice" language, the test is so permissive as to be utterly ineffectual. There is not a single state law that actually *prevents* the federal government from "speaking with one voice" when regulating foreign commerce. The Foreign Commerce Clause fully empowers Congress both to pass positive regulations of foreign commerce that will

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[6] *Japan Line* states that where a state tax is at issue, a court must also inquire "whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation." 441 U.S. at 451. This factor is obviously particular to state taxation, and cannot be applied to state regulation or spending.

preempt any inconsistent state laws, and to negate or invalidate state laws affecting foreign commerce that in its judgment do not advance the foreign policy interests of the United States.

Under the other plausible interpretation of the "one voice" language, the test is impossibly strict. Dormant Foreign Commerce Clause doctrine cannot possibly lead to the invalidation of every state law that could *potentially* conflict with Congress's judgment about the proper conduct of foreign commercial relations, with the goal of preserving for Congress a pristine slate on which to write foreign commercial policy. The early nineteenth-century view that Congress and the States possessed exclusive, non-overlapping powers over, respectively, interstate and local commerce soon fell to the reality of economic integration, which left little room for "exclusively local" or "exclusively interstate" commerce. As this Court noted in *Southern Pacific Co. v. Arizona ex rel. Sullivan,* 325 U.S. 761 (1945), "[e]ver since *Willson v. Black-Bird Creek Marsh Co.,* [27 U.S.] 2 Pet. 245 (1829), and *Cooley v. Board of Wardens,* [53 U.S.] 12 How. 299 [(1851)], it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the State to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Southern Pacific Co.,* 325 U.S. at 766-67. In today's global economy, it is equally impossible to maintain a categorical distinction between local and foreign commerce. Indeed, the Massachusetts Burma Law would have no application unless there were companies that wished to do business in both Boston and Rangoon, cities that are on opposite sides of the earth.

Thus, dormant Foreign Commerce Clause doctrine, like dormant Domestic Commerce Clause doctrine, must rest

on this Court's pragmatic judgment about which type of state actions deeply and persistently conflict with national interests, while having little connection to traditional legitimate state interests. The ordinary exercises of a State's powers to spend and dispose of property that fall under this Court's market participant doctrine are among the least likely to so challenge national interests.

First, as argued above, spending power exercises are ordinarily self-limiting, because they depend upon state residents' willingness to tax themselves. For example, to date the most widespread movement of state and local governments to refrain from financial participation in morally offensive practices of a foreign government was undoubtedly that associated with protests against South African apartheid. Yet although at that movement's height some 140 state and local governments had some policy restricting the use of public funds relating to South Africa, *see* Earl H. Fry, "The US States and foreign economic policy: federalism in the 'new world order,'" in *Foreign Relations and Federal States* 122, 134 (Brian Hocking, ed. 1993), they were a fraction of the 83,000 state and local governments then existing in the United States. *Id.* at 123-24. The measures were enacted only in those jurisdictions in which constituents cared enough about the issue to accept the risk of increased costs or lower returns on investment.

At the same time, as more fully developed below, a State's power to determine the use of its public resources is at the core of state sovereignty. This is particularly true when, as in the case of the Massachusetts Burma Law, the state funds at issue are presumably being used to provide ordinary, traditional state services, and the global nature of commerce forces the State to decide whether in providing these services it should be supporting morally offensive practices in foreign jurisdictions.

Of course, foreign governments that do not understand American federalism may occasionally misattribute proprietary actions of a state or local government to the federal government, and conclude that such actions are a reflection of official United States policy. These misattributions, however, should hardly lead this Court to prohibit the state actions. After all, foreign governments that do not understand the freedoms enjoyed by American citizens may also misattribute the actions of private individuals to the federal government, yet such misattribution would not provide sufficient grounds for curtailing First Amendment protections of freedom of speech.

Finally, since a State's decisions about how to use its own resources do not regulate private activity, there is no chance that those decisions will conflict with federal regulations governing private foreign commerce, which constitutes the bulk of foreign commerce. In other words, as this Court noted in *United Building and Construction Trades Council v. Camden*, 465 U.S. 208 (1984), "[w]hen the State acts solely as a market participant, no conflict between state regulation and federal regulatory authority can arise." *Id.* at 220 (emphasis deleted). The *Camden* Court went on to hold that the market participant doctrine did not apply to the Privileges and Immunities Clause, U.S. Const. Art. IV, § 2, because that clause, unlike the Commerce Clause, "imposes a direct restraint on state action in the interests of interstate harmony." *Id.* Its remarks about the market participant doctrine in the Commerce Clause context, however, apply equally to the Foreign and Domestic Commerce Clauses, and therefore support the full recognition of the doctrine in the Foreign Commerce Clause context.

In sum, the market participant doctrine is as essential in the context of dormant Foreign Commerce Clause analysis as in dormant Domestic Commerce Clause analysis,

and there is no reason for this Court categorically to distinguish between the two. It is not clear what is to be gained by applying some indeterminately "more rigorous" scrutiny in Foreign Commerce Clause analysis than in Domestic Commerce Clause analysis.[7] *See Reeves*, 447 U.S. at 437 n.9 (suggesting that scrutiny of state proprietary activities may "well be more rigorous when a restraint on foreign commerce is alleged"). If, however, this increase in rigor means that spending power exercises on the edges of the "linked tax/subsidy" and "leveraged economic favoritism" exceptions to market participant doctrine are more likely to be invalidated under those exceptions, then the closer scrutiny will not affect the Massachusetts Burma Law, because it falls nowhere near those exceptions.

II. THE MASSACHUSETTS BURMA LAW DOES NOT VIOLATE THE FOREIGN COMMERCE CLAUSE BECAUSE IT ADVANCES A LEGITIMATE STATE PURPOSE THAT CANNOT BE ADEQUATELY SERVED BY REASONABLE NONDISCRIMINATORY ALTERNATIVES

Because the Massachusetts Burma Law restricts state purchases from companies that maintain certain specified

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[7] The Framers may well have envisioned that Congress would exercise its foreign commerce power to serve a more complex set of ends. The maintenance of a free international market may not be the sole dominating inspiration for the foreign commerce power in the same way that the maintenance of a free national market was the central inspiration of the interstate commerce power. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (stating that the interstate commerce power was designed "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation"). Yet in one sense that complexity counsels against a strong dormant Foreign Commerce Clause doctrine, because it is not as easy for courts to determine what mix of values should be served in the absence of Congressional action. *See Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 328 (1994).

connections with a named foreign country, the law facially discriminates against foreign commerce. Even absent the market participant doctrine, however, facial discrimination will not be fatal under dormant Commerce Clause analysis if the "discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. v. Limbach*, 486 U.S. 269, 274 (1988), or, in an alternative formulation, if the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 278. *See, e.g., Maine v. Taylor*, 477 U.S. 131 (1986) (upholding absolute ban on the importation of baitfish into Maine on grounds of disease prevention).

1. In this case, the law is completely unrelated to economic protectionism, as it confers no advantage on either local consumers or local merchants. *Cf. Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 580 (1986) (dormant Commerce Clause doctrine concerned with both producer and consumer favoritism). The law imparts no economic benefit to the Commonwealth or its taxpayers. On the contrary, it forces the Commonwealth of Massachusetts to pay more for goods and services.

Nor does it impart any discernible economic benefit to Massachusetts producers. The law's restrictions apply to all companies that are "doing business with Burma," and thus apply equally to Massachusetts and non-Massachusetts companies maintaining a specified connection to Burma. And, of course, there is no evidence that any Massachusetts legislator believed that the law would favor Massachusetts businesses or supported the law for that reason. Thus, the law is not a " 'discriminatory' provision in the constitutionally prohibited sense—that is, a protectionist enactment." *New Energy Co.*, 486 U.S. at 278. To be sure, "the standards for . . . justification [of a facially

discriminatory enactment] are high." *Id.* Here, however, the complete lack of protectionist purpose or effect associated with the Massachusetts Burma Law renders it capable of meeting even those high standards.

2. In spite of the Massachusetts Burma Law's demonstrable lack of protectionist purpose or effect, the court below mistakenly held that it ran afoul of the Commerce Clause because it advanced no "local" purpose at all, and therefore advanced no " 'legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.' " *See* Pet. App. 57a-58a (quoting *New Energy Co.*, 486 U.S. at 274, 278). This conclusion is mistaken for two reasons.

First, this Court has distinguished between local and non-local purposes only when reviewing exercises of a State's coercive powers of taxation and regulation. For good reason, it has not extended the requirement of a specifically local purpose to exercises of a State's power to spend and dispose of property.

The local purpose requirement is closely tied to the Commerce Clause doctrine prohibiting state regulation where its " 'practical effect . . . is to control [conduct] beyond the boundaries of the state.' " *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (quoting *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945)). The prohibition on wholly extraterritorial regulation stems from the need to protect the sovereignty of other States, which would otherwise be hampered in their ability to enforce their regulatory choices about conduct in their own jurisdictions. *See id.; BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 (1996) ("[I]t follows from . . . principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing . . . lawful conduct in other States."). A regulation that aims to protect parties

to wholly extraterritorial transactions does not have a "legitimate local purpose" because it encroaches on the regulatory prerogatives of other sovereign States. *See, e.g., Edgar,* 457 U.S. at 642, 644 (striking down an Illinois securities regulation that "could be applied to a tender offer which would not affect a single Illinois shareholder" while noting that "the State has no legitimate interest in protecting nonresident shareholders").

The exercise of a State's spending power, however, does not encroach on the prerogatives of other sovereigns in the way that an exercise of taxing or regulatory powers does. For example, an appropriation of state funds for disaster relief in another State or a foreign country that has suffered a natural calamity would seem to lack a "legitimate local purpose," in this Court's use of that phrase in regulatory contexts. Such funds would be put to wholly extraterritorial use, and would not directly benefit any resident of the donor State. Yet it seems unthinkable that such an appropriation would violate the federal constitution on the grounds that the negative Commerce Clause prohibits States from taking any interest in events beyond their borders. Rather, it becomes clear that the prohibition on extraterritorial purposes logically extends only to the use of a State's coercive powers.

Second, even if the "legitimate local purpose" requirement extends to exercises of a State's spending power, in this case there is a perfectly legitimate local purpose "that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co.*, 486 U.S. at 278. As the First Circuit recognized, the Massachusetts Burma Law was motivated by "Massachusetts's desire to eliminate moral taint that it claims it suffers from dealing with firms that do business in Burma." Pet. App. 47a. This goal—to ensure that funds collected from Massachusetts residents are not used to support the "deplorable"

human rights conditions in Burma. Pet. App. 5a—must be carefully distinguished from two other potentially related but distinct goals. Once that distinction is made, it becomes clear that the legislation passes the test articulated in *New Energy Co.*

To begin with, the goal of refraining from supporting practices judged to be morally offensive is distinct from the goal of changing those practices. A refusal to do business with companies that are connected with Burma might also be justified on those latter "reform" grounds, as an attempt to induce Burma to change its morally offensive practices. Indeed, the legislative history of the Massachusetts Burma Law identifies this as one of the motivations cited by its supporters. *See, e.g.*, Pet. App. 9a (quoting statement by the bill's sponsor, Rep. Byron Rushing, that "the 'identifiable goal' of the law was 'free democratic elections in Burma' "). Yet, as Governor Weld noted, the Massachusetts Burma Law was unlikely to change the situation in Burma: "[o]ne law passed by one state will not end the suffering and oppression of the people of Burma." *Id.*

Nevertheless, regardless of the chances of inducing reform, Massachusetts did not want to act in a way that its legislators perceived as participating in wrongdoing. This is an utterly common, normal moral judgment. Moreover, it is a judgment that other state and local governments, in other situations, have made with regard to public funds. The Maryland Court of Appeals, for example, found that the "legitimate, local public interests" supporting the City of Baltimore's decision to withdraw city pension funds from investments in companies doing business in South Africa included "the local interest in . . . ensuring that pension funds are invested in a socially responsible manner [and the desire of] the City and its citizens to distance themselves from the moral taint of

coventuring in firms that, in the view of many, help to maintain South Africa's system of racial discrimination." *Board of Trustees of the Employees' Retirement System v. Baltimore*, 562 A.2d 720, 755 (Md. 1989).

The goal of refraining from supporting morally offensive practices is also distinct from that of expressing disapproval of such practices. Massachusetts might want to express disapproval of Burmese practices whether or not any of its budget could potentially be paid to companies doing business with Burma, and it could do so by means of resolutions or other official communications. Conversely, Massachusetts might want to refrain from using public funds in a way it believed would support Burma whether or not Burmese government officials ever learned of or paid any attention to its action, because it simply did not want to have state funds used in that manner. In this case, the record discloses both communicative and non-participation purposes underlying the Massachusetts Burma Law. *See* Pet. App. 9a (noting that Massachusetts's district court brief contended that one of the law's goals was to "express[] the Commonwealth's own disapproval of the violations of human rights committed by the Burmese government"). These purposes, however, are independent of each other.

The interest in avoiding use of public funds to support morally offensive practices, distinct from both reformist and communicative interests, is the clearest legitimate local interest that cannot be adequately served by any reasonable nondiscriminatory alternative. Although *amici* believe that the goal of encouraging reform of Burmese practices is perfectly legitimate so long as it is pursued through the spending power rather than the coercive powers of regulation and taxation, a broad reading of this Court's extraterritorial regulation cases may cast some doubt on the legitimacy of an interest in changing conditions in other States and countries. And although *amici* believe that no reasonable nondiscriminatory alternative would adequately serve the communicative purpose of expressing Massachusetts's strong disapproval of Burmese policy—a simple resolution, unaccompanied by any willingness to forego the economic advantages of accepting a lowest bid from a Burma-connected company, could not be taken as seriously—it might be argued that resolutions and other official pronouncements "adequately," if not perfectly, serve the interest of communicating disapproval.

The interest in refraining from supporting offensive practices in Burma suffers from neither of these arguable defects. Massachusetts has an undeniably legitimate interest in ensuring that its public funds are not used in support of practices that its residents find to be morally offensive. Indeed, Massachusetts presented a strong argument in the court of appeals that, in light of the respect accorded state sovereignty under the federal constitutional scheme, as reflected in the Tenth Amendment, the Foreign Commerce Clause does not even empower Congress to override the wishes of state residents to refrain from spending state funds in support of morally offensive practices. *See* Pet. App. 39a (citing *Printz v. United States*, 521 U.S. 898, 933-35 (1997) and *New York v. United States*, 505 U.S. 144, 178-80 (1992)). Whether or not Congress could pass affirmative legislation to this effect, there is no reason for this Court, in elaborating the more limited dormant Commerce Clause doctrine, to leap to the other extreme and require Congressional approval of States' attempts to set morally responsible spending policy.

The interest in ensuring that public funds not be used to support the current Burmese regime is also, in particular, a "legitimate *local* purpose." It must be presumed that the public funds subject to the Burma Law are being

used for quite ordinary, traditional state functions such as law enforcement, road building, education, welfare, public services, and so on, all quintessentially legitimate local activities. Due to the global nature of trade and business activities at the turn of the twenty-first century, when Massachusetts engages in public procurement to carry out these traditional state functions, it is forced to consider whether or not to do business with companies that its citizenry perceives as supporting regimes engaged in morally offensive practices. That choice is essentially a local choice in that it is made about funds collected locally and dispensed locally, while pursuing local interests, without any attempt to project the coercive powers of the State outside its boundaries.

3. There is no reasonable nondiscriminatory alternative to the Massachusetts Burma Law that would adequately serve Massachusetts's legitimate interest in ensuring that its public funds not be used to support the current regime in Burma. Hortatory resolutions alone utterly fail to serve this interest; it can only be furthered by a purchasing policy, and that policy must make some distinction between payments that would in the legislators' judgment be too directly connected to the Burmese government, and those that would have little or no connection. Massachusetts has chosen to draw this line to include companies that have a presence in Burma or do business with Burma. This line is not the only one that could be drawn, but it embodies a legislative judgment that is entitled to deference.

To be sure, viewed from one perspective, Massachusetts is "attempting to impose on companies with which it does business conditions that apply to activities not even remotely connected to such companies' interactions with Massachusetts." Pet. App. 45a. This attempt, so described, led the court of appeals to conclude that the

Burma Law was not protected by the market participant doctrine. Yet while a company's activities in Massachusetts and Burma may be operationally unconnected—the company may be supplying paper clips to one and radar equipment to the other, from two entirely different divisions—the Massachusetts Burma Law rationally assumes that the activities are financially connected. Profits and losses from the activities flow to the same entity, and revenues from the profitable supply of paper clips to Massachusetts might turn out to offset losses from radar equipment sales to Burma. This is precisely the connection that Massachusetts is attempting to avoid, and avoiding that connection cannot be accomplished by any reasonable nondiscriminatory alternative to the Massachusetts Burma Law. Thus, even absent the market participant doctrine, the Massachusetts Burma Law survives Commerce Clause scrutiny because "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co.*, 486 U.S. at 278.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 13, 2000